



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

DEC 10 2013

**MEMORANDUM**

**SUBJECT:** Response to Office of Inspector General Report No. 13-R-0321  
"Projected Emission Reductions Overstated and Buy American Requirements  
Not Met Under EPA award to the Tennessee Department of Transportation,"  
dated July 19, 2013

**FROM:** A. Stanley Meiburg, Acting Regional Administrator  
EPA Region 4

**TO:** Arthur A. Elkins, Jr.  
Inspector General

Thank you for the opportunity to respond to the issues and recommendations in the subject report. Following is a summary of the agency's overall position, along with its position on each of the report recommendations.

**AGENCY's OVERALL POSITION**

The U.S. Environmental Protection Agency Region 4 does not agree with the findings and recommendations detailed in the report, and has provided detailed explanations in the attached table. The EPA Region 4 respectfully stands by its written determination that the Buy American (BA) requirements do not apply to this Cooperative Agreement, because the projects are not "public works" as defined in 2 CFR Section 176.140(a)(2), and as such we propose to allow the grantee to retain the federal share of all questioned costs.

With respect to the Inspector General's recommendations addressing projected emission reductions reported by the Tennessee Department of Transportation in its final project report, EPA Region 4 respectfully stands by its conclusion that emission reduction results reported by TDOT based on projected use assumptions and actual usage data available were reasonable and sound based on established policy and assumptions in use at the time the report was prepared. However, EPA Region 4 and TDOT are revisiting the calculations based on more recent actual usage data and to consider any adjustments to agency policy on projected usage assumptions if applicable. EPA Region 4 will provide an addendum to the final report as appropriate to report out on any recalculated emission reductions.

## CONTACT INFORMATION

If you have any questions regarding this response, please contact Dorothy Rayfield, Audit Follow-up Coordinator, Chief of the Grants and Acquisitions Management Branch at (404) 562-9278 or [rayfield.dorothy@epa.gov](mailto:rayfield.dorothy@epa.gov), or Stuart Perry, Chief of the Indoor Environments and Grants Section, at (404) 562-8980 or [perry.stuart@epa.gov](mailto:perry.stuart@epa.gov).

## Attachment

cc: Robert Adachi, Product Line Director  
Office of Inspector General



## AGENCY's RESPONSE TO REPORT RECOMMENDATIONS

### Disagreements

No.	Recommendation	Agency Explanation/Response	Proposed Alternative
1	Disallow and recover Recovery Act funds of \$1,623,049, unless TDOT can certify that the project complied with the Buy American requirements in the Recovery Act, as required by the EPA cooperative agreement with TDOT	<p>The U.S. Environmental Protection Agency Region 4 maintains that the activities conducted as part of the Tennessee Department of Transportation (TDOT) truck stop electrification (TSE) cooperative agreement (CA) are not "public works" as defined in 2 CFR Part 176.140(a)(2), and therefore are not subject to the BAA requirements stipulated in Section 1605 of the American Recovery and Reinvestment Act (ARRA) of 2009.</p> <p>The TDOT CA included the generic Buy American Act (BAA) term and condition (T&amp;C) for projects considered to be "public works." The Office of Transportation and Air Quality (OTAQ) and Office of General Counsel (OGC) approved the T&amp;C as a reasonable interpretation of the BAA to truck stop electrification (TSE) projects carried out by governmental grantees. The T&amp;C states: In practice, "[projects]...are considered to be public works when a governmental entity is conducting the project." Conducting the project is defined by the type of entity that was actually procuring and managing the construction, alteration, maintenance or repair of the equipment. Therefore, if the state is contracting directly for the procurement/installation of the TSE equipment then the project is considered to be public works and is subject. If the state is subgranting to a truck stop owner that is a governmental entity (such as the DOT) and that subgrantee is contracting for the procurement/installation of the TSE equipment then the project is considered to be public works and is subject. If the state is subgranting to a nongovernmental entity (such as a nonprofit or private truck stop owner) and that subgrantee is contracting for the procurement/installation of the TSE equipment then the project is not public works and is not subject.</p>	EPA Region 4's Management Decision is to allow the grantee to retain the federal share of all questioned costs due to non-applicability of the Buy American Act requirements.



		<p>As part of the TDOT CA, EPA provided \$2 million of Recovery Act funds in support of TDOT's proposal to provide grants for the installation of a network of TSE facilities at selected interstate highway truck stops in Tennessee. TDOT initially solicited grant applications from truck stop owners, and due to insufficient responses after two solicitations, TDOT notified EPA that it was likely they would be unable to award all ARRA funds. On or about April 10, 2010, the EPA approved TDOT's request to revise the grant solicitation to allow TSE vendors in partnership with truck stop owners to submit grant applications. At the conclusion of the third round of solicitation, one truck stop owner had committed to conduct a TSE project and four TSE vendors submitted applications. TDOT subgranted awards to the one truck stop owner and to three of the four TSE vendors that responded to the third solicitation. Each vendor partnered with a truck stop owner for the installation and construction of TSE equipment.</p> <p>The EPA issued a written determination to TDOT advising that the BAA was not applicable. The EPA did not consider the projects public works based on the following facts: (1) TDOT would not be responsible for conducting the projects, instead, it would manage and oversee projects performed by subgrantees (TSE vendors partnered with truck stop owners); (2) TDOT required TSE vendors to partner with truck stop owners and agreements were entered into between these entities, therefore, the work was not considered conducted by a governmental entity; (3) Installation was conducted on a private facility by a private company; (4) The purpose of the subgrant was to carry out a public purpose; specifically, a reduction in diesel emissions resulting from the installation of electrified parking spaces at truck stops – the procurement of TSE equipment, construction and installation was ancillary to this public purpose; (5) the TSE vendors had some responsibility for programmatic decision making; (6) TDOT measured TSE vendors' performance against objectives of the program (the TSE/truck stop partnership); and (7) TDOT required TSE vendors to comply with applicable ARRA requirements.</p>	
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	<p>After receiving EPA's determination of non-applicability, TDOT did not pursue obtaining a BAA certification from Convoy Solutions although it obtained certifications from other TSE vendors.</p> <p>TDOT's response to the OIG draft report dated March 11, 2013, supports EPA's conclusion that TDOT did not conduct the projects within the meaning of a "public work":</p> <p><b>"TDOT Did Not Conduct the Project"</b></p> <p>OIG has concluded that "TDOT contracted rather than subgranted the procurement and installation of the TSE facilities. In doing so, TDOT conducted the project and, as such, per DERA program determination, Buy American requirements would apply." Further, OIG finds that by opening the grant competition to TSE technology vendors, this "resulted in TDOT's procurement of equipment and installation of the equipment directly from three TSE technology vendors."</p> <p>TDOT strongly disagrees with the OIG conclusion. As noted in the OIG audit report, TDOT's role was to develop and facilitate a grant competition and to oversee the selection of grantees who would be conducting the project. Further, TDOT's role was to ensure successful completion of the selected projects, monitor performance of grantees and ensure compliance with applicable laws, regulations, and terms and conditions that flow down from the EPA grant award.</p> <p>The purchase and installation of truck stop electrification (TSE) equipment at four Tennessee truck stops was carried out by the successful applicants that responded to TDOT's request for grant applications. Those grantees ordered and received TSE equipment, published bid requests and managed the procurement process for selecting construction and electric contractors, supervised construction and paid invoices for equipment and installation costs. Three of the grantees identified candidate truck stops for installing TSE technology and negotiated agreements with the host truck stops. This was done in all three cases without TDOT's involvement or participation. The conclusion that TDOT conducted the project directly contradicts the</p>	
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		<p>facts.</p> <p>TDOT did provide oversight and monitoring of this ARRA project and TDOT staff worked diligently with partner companies to ensure that state and federal requirements were met. However, TDOT understands that this monitoring was required by ARRA and necessary to ensure that procurement and financial procedures and requirements were satisfied. In any case, that oversight does not mean that TDOT conducted the project. That conclusion simply cannot be supported by an objective evaluation of how the project was implemented.”</p> <p>The EPA determination that the BAA was not applicable because the projects were not “public works” was a reasonable exercise of discretion in consideration of the definition of “public work” found in 2 C.F.R. §176.140(a)(2) which means a “public building or public work of a governmental entity” such as a state or local government (emphasis supplied). The facts considered by EPA in making its determination described above, coupled with the definition of “public works” for purposes of the Recovery and Buy America Acts are consistent with the considerations delineated in OMB Circular A-133 § 210(b) for a subgrant. The Circular does not require that all characteristics of a subgrant be present and that the substance of the relationship is more important than the form of the agreement when determining whether a subgrant or vendor relationship exists. As demonstrated above, EPA reasonably considered the regulation and salient facts in reaching its determination that subgrants were permissible instruments for TDOT to carryout TSE projects, and consequently, the BAA did not apply.</p> <p>Further, the OIG’s proposed resolution, for Region 4 to disallow the entire \$1,623,049 awarded to TDOT although the OIG is questioning only one of four projects (or even just the costs incurred by TDOT for the Convoy Solutions subgrant) may raise affirmative management decision doctrine issues. That doctrine, first articulated in an Audit</p>	
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		<p>Resolution Board Decision (ARD) 13/14 (February 24, 1984), stands for the proposition that if the reviewing agency affirmatively considered and approved cost items during the administration of a grant, EPA will not subsequently disallow such costs, unless it determines that the previous approval was outside the limits of the reviewing agency's managerial discretion or was unreasonable or arbitrary. The Agency has consistently followed this principle in grant disputes. See <u>Metropolitan Waste Control Commission</u>, 05-99-AD03 (June 29, 1999) and the cases cited therein. In this case, the OIG's own audit and report does not question the costs incurred by TDOT for three of the four subgrants. As to the Convoy Solutions subgrant questioned by the OIG, TDOT relied on a written determination from EPA that the BAA was not applicable to the Convoy Solutions project. The Agency believes that written determination was accurate based on the definition of "public work" in 2 C.F.R. § 176.140(a)(2) and that the determination was within the EPA's discretion under OMB Circular A-133.</p>	
2	<p>For the iron, steel and manufactured goods for which TDOT cannot certify compliance, employ the procedures set forth in 2 CFR Part 176.130 to resolve the noncompliance. In the event that Region 4 decides to retain foreign iron, steel, and manufactured goods in the project under 2 CFR Part 176.130(c)(3), Region 4 should reduce the amount of the award by the cost of the steel, iron or manufactured goods that</p>	<p>EPA maintains that the activities conducted as part of the Tennessee Department of Transportation (TDOT) truck stop electrification (TSE) cooperative agreement (CA) are not "public works" as defined in 2 CFR § 176.140(a)(2) and therefore are not subject to the Buy American Act (BAA) requirements stipulated in Section 1605 of the American Recovery and Reinvestment Act of 2009.</p> <p>As previously noted, TDOT was selected by EPA Region 4 as part of the national grant competition and awarded \$2,000,000 on June 29, 2009. The grant was closed on April 26, 2012, with total expenditures of <b>\$1,623,049</b>.</p> <p>For this CA, TDOT conducted several open grant competitions that led to its selection of four subgrants. From the first grant competition conducted by TDOT, <b>Mountain Plaza Truck Stop</b> was selected for a grant award. From the third grant competition, TDOT awarded three additional subgrants applied for by three separate vendors in partnership</p>	<p>EPA Region 4's Management Decision is to allow the grantee to retain the federal share of all questioned costs due to non-applicability of the Buy American Act requirements.</p>



	are used in the project.	<p>with truck stop owners to <b>ShorePower, J.R. Enterprises, and Convoy Solutions.</b></p> <p>Although EPA does not agree with the OIG conclusion that the BAA requirements apply to this CA, EPA in conjunction with TDOT have reviewed each of the subgrants from the perspective of BA compliance. With the exception of the Convoy Solutions subgrant, each of the three other subgrantees have provided BA certification documentation, which was acknowledged in the OIG report.</p> <p>For the Convoy Solutions subgrant, the subgrantee has indicated that with the exception of the recycled trusses/columns/buildings used in their project at a cost of \$40,000, all other manufactured goods are BA compliant.</p>	
3	Review the assumptions used by TDOT to calculate projected results to determine if the assumptions are valid, consistent with the DERA program guidance, and representative of project usage. If needed, work with TDOT to develop a more accurate projection of project results based on actual usage and a more realistic assumption of anticipated usage.	<p>EPA Region 4 respectfully stands by its conclusion that emission reduction results reported by TDOT based on projected use assumptions and actual usage data available were reasonable and sound based on established policy and assumptions in use at the time the report was prepared.</p> <p>EPA maintains that the projected results provided by TDOT in its final project report were based on valid assumptions for anticipated usage and that an expectation did not exist from EPA that TDOT should have delayed preparation of their final report to await more up to date actual TSE usage data in its emission calculations. Further, EPA maintains that the overall objectives of the CA have been met by TDOT</p>	<p>In the interest of addressing the concerns raised in the OIG report, EPA Region 4 proposes a Management Decision that includes EPA and TDOT's review of projected emission reductions for this CA.</p> <p>EPA Region 4 and TDOT are revisiting the calculations based on more recent actual usage data and will consider any adjustments to Agency policy on projected usage assumptions if applicable, and provide an addendum to the final report as appropriate to report out on any recalculated emission reductions.</p>



			EPA Region 4 and TDOT will undertake and complete this task by the end of the second quarter FY 14.
4	Review any recalculated results of the project in accordance with EPA Order 5700.7 and Programmatic Condition 4 to determine whether TDOT achieved the objectives of the cooperative agreement.	See Item 3 above. EPA maintains that the overall objectives of the cooperative agreement have been met by TDOT.	EPA Region 4 and TDOT are revisiting the calculations based on more recent actual usage data and will consider any adjustments to Agency policy on projected usage assumptions if applicable, and provide an addendum to the final report as appropriate to reflect any recalculated emission reductions.
			EPA Region 4 and TDOT will undertake and complete this task by the end of the second quarter FY 14.
5	Adjust the DERA program reporting of TDOT project results to reflect recalculated results.	See Item 3 above.	See Item 3 above.  If applicable, EPA Region 4 in conjunction with TDOT will provide an addendum to the final report reflecting any recalculated emission reductions.  EPA Region 4 and TDOT will undertake and complete this task by the end of the second quarter FY 14.



